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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 20

DELTA SANDBLASTING COMPANY, INC.,

Respondent,

and

INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, DISTRICT
COUNCIL 16,

Charging Party.

Case No. 20-CA-176434
32-CA-180490

**REPLY TO ANSWER BRIEF TO
CROSS-EXCEPTIONS TO DECISION
OF THE ADMINISTRATIVE LAW
JUDGE**

I. INTRODUCTION

The International Union of Painters and Allied Trades, District Council 16 (“Union” or “Charging Party”) hereby submits its Reply Brief to the Respondent’s Answering Brief in response to the Union’s Cross-Exceptions to the Decision of the Administrative Law Judge.

II. ARGUMENT

A. THE CHARGING PARTY TAKES EXCEPTION TO THE ALJ'S DECISION ON THE HEINZ VIOLATION TO THE EXTENT IT RESTED ON IMPROPER HEARSAY TESTIMONY

The Respondent improperly characterized the Union's cross-exceptions in its Answering Brief. The cross-exceptions narrowly took exception to the ALJ's reliance on the hearsay testimony of Floyd Farley and John Capovilla. Such cross-exceptions were based on the legal question of whether their hearsay testimony was properly credited by the ALJ, reliant on the legal question of whether the hearsay exception under Fed. R. Evid. 803(3) applied, which is not a credibility determination.

The authorities cited by the Respondent in its Answering Brief are not instructive as they assume that the testimony related to the declarant's state of mind. Here, Farley and Capovilla's testimony the ALJ credited is not of the declarant's state of mind, and thus we do not even get to the question of relevance.

As argued in the Union's cross-exceptions, the hearsay exception under Fed. R. Evid. 803(3) was not met because Farley and Capovilla's testimony did not relate to the state of mind of Robert Sanders, rather it was their memory of a conversation to prove a fact remembered. *See U.S. Info. Sys. v. IBEW Local Union No. 3*, 2006 U.S. Dist. LEXIS 52938, *24 (distinguishing between hearsay evidence admissible for the limited purpose of proving customer motive and inadmissible hearsay evidence of facts recited to furnish the motives in an antitrust case). Had the testimony of Farley and Capovilla been that Sanders directly said on the phone "I do not agree to the contract the Union proposed," or words to that effect, the question as to whether the 803(3) hearsay exception is applicable would be more clear. However, the hearsay testimony credited by the ALJ included that regarding Sanders' allegedly saying words along the lines of "you're threatening me." Such testimony does not fall within the bounds of the 803(3) hearsay exception as it includes statements recited and being offered to prove the motive or intent of Sanders with respect to contract bargaining.

B. THE REMEDIES SOUGHT ARE APPROPRIATE IN LIGHT OF THE VIOLATIONS

The Respondents failure to make surcharge contributions owed to the Pension Fund amounted to thousands of dollars unpaid. The Respondents' failure is in violation of well-established precedent that an employer who fails to continue to make contributions after the contract expires violates Section 8(a)(5) of the Act.¹ The Union's proposed remedy includes an affirmative admission that a violation of 8(a)(5) occurred, which is a violation the ALJ found. See p. 10 of the ALJ decision. In the event the ALJ's decision on the *Heinz* violation is re-considered, the Union also asks, in addition, that the remedy properly include an admission that a violation on that basis occurred. The Respondent's conclusory assertion that the remedies sought "are out of proportion to the magnitude of the alleged violations" is unsupported and contrary to the record. The Respondent cites no authority to refute that the remedies sought by the Union are inappropriate. The ALJ squarely found an 8(a)(5) violation, in this case which had the result of currently depriving members of thousands of dollars in their pension fund. Thus, the Union's request for a remedy that includes a mailing of the decision, a lengthier posting period and reading of the notice is in line with the nature of the violation. The Union's request that members be adequately apprised of the explanation for the remedies is a reasonable request given the deprivation caused by the Respondent's violation.

Dated: December 5, 2017

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By: /s/ Caroline N. Cohen
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¹ See authorities cited on p. 9, lines 32-35 of the ALJ's decision.

PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On December 5, 2017, I served the following documents in the manner described below:

REPLY TO ANSWER BRIEF TO CROSS-EXCEPTIONS TO DECISION OF THE ADMINISTRATIVE LAW JUDGE

- ☒ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from lhull@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 5, 2017, at Alameda, California.



Lara Hull